Public Prosecutor v Shee Chin Wah

HIGH COURT (MELAKA) — CRIMINAL TRIAL NO 45-1 OF 1997
SURIYADI J
21 OCTOBER 1997

Criminal Procedure *— Arrest — Arrest, what constitutes — Whether there must be actual physical arrest — Whether constructive arrest sufficient — Whether accused was under arrest — Question of fact*

Criminal Procedure *— Trial — Close of prosecution's case — Whether prosecution to establish case on prima facie or beyond reasonable doubt standard — Criminal Procedure Code (FMS Cap 6) s 180*

Evidence *— Statement — Accused's statement taken without administering caution — Statement made after arrest — No caution administered — Whether statement by accused admissible*

On 10 January 1997 at about 3.30am, the accused, while driving, was stopped by a police party at the Air Keroh Toll Plaza. He drove the car to the side and after alighting, produced a packet of cigarettes from which were retrieved 12 rolls of cigarettes and a roll of nipah leaves suspected to be ganja. The police then found a plastic bag in the spare tyre compartment, later confirmed to be containing cannabis. At this stage, the accused was alleged to have said, 'itu ganja' and 'bagilah saya peluang'. On 24 January 1997, the accused was charged under s 39B of the Dangerous Drugs Act 1952 ('the Act') for trafficking in 2.7kg of cannabis. Several issues had to be decided by the court, namely, whether: (i) the chemist, by equating cannabis with Indian Hemp, showed that no offence was committed; (ii) the remarks — 'itu ganja' and 'bagilah saya peluang' — after the plastic bag was discovered in the boot of the car were admissible; (iii) at the time of making the remarks, the accused was already under arrest even though he was not physically arrested or even told so; (iv) the tendering of the cigarettes as evidence was prejudicial to the accused's case; and (v) the prosecution had to establish a case on the prima facie standard or beyond reasonable doubt.

Held, acquitting and discharging the accused:

(1) As a result of the Dangerous Drugs (Amendment of First Schedule) Order 1996, 'cannabis (Indian Hemp) and cannabis resin (resin of Indian Hemp)' were deleted as dangerous drugs from the First Schedule of the Act. However, the name Indian Hemp is one of the common names of cannabis in other countries. The chemist also agreed that cannabis and Indian Hemp were one and the same thing in reference to the old First Schedule. The exhibits were therefore cannabis as defined under s 2 of the Act and the charge was in order (see pp 434G–H and 435A–H).

(2) If a statement is made by a person before any arrest is effected on him and no caution has been read out to him, so long as that statement was not caused by any inducement, threat or promise

having reference to the charge against him, such statement may be relevant and admissible against him. Generally, arrest may be actual arrest or constructive arrest. Whether a person is actually under arrest is a question of fact to be decided according to the circumstances of each case. In this case, since the accused had been found in possession of 12 rolls of cigarettes suspected to contain cannabis, with the police not wanting to hamper his movements as his assistance was still required, compounded further by the view of the raiding officer PW5 that he had considered the accused to be under arrest, it was clear that the accused was under arrest. In short, the discovery of the drugs upgraded the accused from a mere user to a potential trafficker in the eyes of the prosecution and therefore, the accused, would most likely have been arrested when he made the remarks. The fact that a caution was not administered after the arrest rendered the remarks inadmissible as evidence (see pp 436I, 437A–B, 439A, D–E and 440A–C); *PP v Kang Ho Soh* [1991] 3 CLJ 2914 followed.

(3) Although the cigarettes were not part of the charge and argued to be prejudicial to the accused, it may still be admitted as evidence, the main consideration being relevancy of the evidence. On this ground, the cigarettes were to be tendered as evidence (see pp 440D and 442A–B).

(4) The amended s 180 of the Criminal Procedure Code (FMS Cap 6) ('the CPC') provides that for criminal cases in the High Court, after the prosecution case has concluded, the court shall consider whether the prosecution has made out a prima facie case. However, all cases filed before 31 January 1997 must be assessed on the basis of the beyond reasonable doubt standard. This right to a standard of proof of beyond reasonable doubt is unaffected by any repeal of a written law in whole or in part. As the case against the accused was filed seven days before the amendment came into effect, the beyond reasonable doubt standard is to be adopted. On the facts, the prosecution has failed to attain this level of proof and the accused is acquitted and discharged accordingly (see pp 442F–I, 443A–D and 445C); *Bahruni bin Ismail v PP* [1997] 2 MLJ 265 followed.

[Bahasa Malaysia summary

Pada 10 Januari 1997 kira-kira pukul 3.30 pagi, tertuduh, sewaktu memandu, telah diberhentikan oleh sepasukan polis di Plaza Tol Air Keroh. Beliau memandu kereta ke tepi dan selepas turun daripada kereta, menunjukkan sebungkus rokok dari mana didapati 12 gulung rokok dan segulung daun nipah yang disyaki adalah ganja. Polis kemudiannya menjumpai sebuah beg plastik dalam petak tayar ganti, yang berikutnya disahkan mengandungi ganja. Di peringkat ini, tertuduh dikatakan telah menyebut 'itu ganja' dan 'bagilah saya peluang'. Pada 4 Januari 1997, tertuduh dipertuduhkan di bawah s 39B Akta Dadah Berbahaya 1952 ('Akta tersebut') kerana mengedar

2.7kg ganja. Beberapa isu harus ditentukan oleh mahkamah, iaitu sama ada: (i) ahli kimia, dengan menyamakan ganja dengan hemp dari India, menunjukkan bahawa tiada kesalahan telah dilakukan; (ii) kata-kata — 'itu ganja' dan 'bagilah saya peluang' — selepas beg plastik dijumpai dalam but kereta boleh diterima; (iii) pada masa kata-kata dibuat, tertuduh sudah pun berada di bawah tahanan sungguhpun dia tidak ditangkap secara fizikal atau diberitahu demikian; (iv) pengemukaan rokok-rokok sebagai bukti memudaratkan kes tertuduh; dan (v) pihak pendakwa hendaklah membuktikan kes atas darjah prima facie atau melampaui keraguan munasabah.

Diputuskan, membebas dan melepaskan tertuduh:

(1) Akibat Perintah Dadah Berbahaya (Pindaan Jadual Pertama) 1996, 'ganja (Hemp dari India) dan resin ganja (resin Hemp dari India)' dipadamkan sebagai dadah berbahaya daripada Jadual Pertama Akta tersebut. Namun demikian, nama Hemp dari India adalah satu daripada nama biasa ganja dalam negara lain. Ahli kimia juga bersetuju bahawa ganja dan Hemp dari India adalah satu-satunya benda yang merujuk kepada Jadual Pertama yang lama. Dengan itu, ekshibit-ekshibit adalah ganja seperti yang ditakrifkan di bawah s 2 Akta tersebut dan pertuduhan adalah mengikut aturan (lihat ms 434G–H and 435A–H).

(2) Jikalau pernyataan dibuat oleh seseorang sebelum tangkapan dilaksanakan padanya dan tiada amaran telah dibacakan kepadanya, selagi pernyataan itu tidak disebabkan oleh apa-apa dorongan, ugutan atau janji yang merujuk kepada pertuduhan terhadapnya, pernyataan demikian boleh menjadi relevan dan boleh diterima terhadapnya. Pada umumnya, tangkapan mungkin tangkapan sebenar atau tangkapan konstruktif. Sama ada seseorang benar-benar ditangkap adalah persoalan fakta untuk diputuskan menurut hal keadaan setiap kes. Dalam kes ini, oleh kerana tertuduh telah didapati dalam milikan 12 gulung rokok yang disyaki mengandungi ganja, dan pihak polis tidak ingin mengongkong gerak-gerinya memandangkan bantuannya masih dikehendaki, ditambah selanjutnya oleh pandangan pegawai yang menyerbu PW5 bahawa beliau telah menganggap tertuduh berada di bawah tangkapan, adalah nyata bahawa tertuduh di bawah tangkapan. Secara ringkas, penemuan dadah-dadah meningkatkan tertuduh daripada pengguna semata-mata kepada bakal pengedar dalam pandangan pihak pendakwa dan maka, tertuduh mungkin sekali ditangkap apabila dia membuat kata-kata itu. Hakikat bahawa amaran tidak diberikan selepas tangkapan menyebabkan kata-kata menjadi tidak boleh diterima sebagai keterangan (lihat ms 436I, 437A–B, 439A, D–E dan 440A–C); *PP v Kang Ho Soh* [1991] 3 CLJ 2914 diikut.

(3) Walaupun rokok-rokok bukanlah sebahagian daripada pertuduhan dan dihujahkan memudaratkan tertuduh, ia masih boleh diterima sebagai keterangan, yang mana pertimbangan utama adalah

kerelevanan keterangan. Atas alasan ini, rokok-rokok haruslah dikemukakan sebagai bukti (lihat ms 440D dan 442A–B).

(4) Seksyen 180 Kanun Acara Jenayah (NMB Bab 6) yang terpinda memperuntukkan bahawa untuk kes jenayah di Mahkamah Tinggi, selepas tamatnya kes pihak pendakwa, mahkamah hendaklah mempertimbangkan sama ada pihak pendakwa telah membuat suatu kes prima facie. Walau bagaimanapun, semua kes yang difailkan sebelum 31 Januari 1997 mestilah ditaksir berdasarkan darjah melampaui keraguan munasabah. Hak kepada darjah membukti melampaui keraguan munasabah ini tidak terjejas oleh mana-mana pemansuhan keseluruhan atau sebahagian undang-undang bertulis. Oleh kerana kes terhadap tertuduh difailkan tujuh hari sebelum pindaan berkuatkuasa, darjah melampaui keraguan munasabah hendaklah diterimapakai. Atas fakta-fakta, pihak pendakwa telah gagal memenuhi tahap membukti ini dan tertuduh dilepaskan dan dibebaskan sewajarnya (lihat ms 442F–I, 443A–D dan 445C); *Bahruni bin Ismail v PP* [1997] 2 MLJ 265 diikut.]

Notes

For cases on what consitutes arrest, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 469–470.

For cases on close of prosecution's case, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2899–2915.

For a case on accused's statement taken without administering caution, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) para 1469.

Cases referred to

Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209 (refd)
Arulpragasan a/l Sandaraju v PP [1997] 1 MLJ 1 (refd)
Bahruni bin Ismail v PP [1997] 2 MLJ 265 (folld)
Boudreau v R [1949] SCR 262 (refd)
Jayaraman & Ors v PP [1982] 2 MLJ 306 (refd)
Krishnan v PP [1987] 1 MLJ 292 (refd)
Noor Mohamed v R [1949] 1 All ER 365 (refd)
Packiam & Anor v PP [1972] 1 MLJ 247 (refd)
PP v Aidil bin Ma'rof [1992] 2 CLJ 1239 (refd)
PP v Amir bin Mahmood & Ors [1996] 5 MLJ 159 (refd)
PP v Chan Choon Keong & Ors [1989] 2 MLJ 427 (refd)
PP v Kang Ho Soh [1991] 3 CLJ 2914 (folld)
PP v Lim Kin Ann [1988] 1 MLJ 401 (refd)
PP v Lin Lian Chen [1992] 2 MLJ 561 (refd)
PP v Md Alim bin Samad [1998] 1 MLJ 260(refd)
PP v Ng Goh Weng & Anor [1979] 1 MLJ 127 (refd)
PP v Rosyatimah bte Neza & Anor [1989] 1 MLJ 360 (refd)
PP v Salamah binte Abdullah & PP v Ong Eng Kiat [1947] MLJ 178 (refd)
PP v Salleh bin Saad [1983] 2 MLJ 164 (refd)

A *PP v Sulaiman bin Mohamad Noor* [1996] 1 MLJ 196 (refd)
PP v Tan Chye Joo & Anor [1989] 2 MLJ 253 (refd)
R v Voisin [1918] 1 KB 531 (refd)
Sambu v R [1947] MLJ 16 (refd)
Shaaban & Ors v Chong Fook Kam & Anor [1969] 2 MLJ 219 (refd)
Tan Geok Kwang v PP [1949] MLJ 203 (refd)
B *Tan Shu En & Anor v PP* [1948] MLJ 196 (refd)
Thavanathan Balasubramaniam v PP [1997] 3 CLJ 150 (refd)
Tong Peng Hong v PP [1955] MLJ 232 (refd)
Wong Yew Ming v PP [1991] 1 MLJ 31 (refd)

C **Legislation referred to**

Criminal Procedure Code (FMS Cap 6) ss 15, 113(1)(a)(ii), 180
Criminal Procedure Code (Amendment) Act 1997 s 4
Dangerous Drugs Act 1952 ss 2, 37(h), 37A(1), 45A(c)
Dangerous Drugs (Amendment of First Schedule) Order 1996
D Evidence Act 1950 ss 26, 114(g)
Interpretation Acts 1948 and 1967 s 30(b)

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Teh Poh Teik (*Teh Poh Teik & Co*) for the accused.

E

Cur Adv Vult

Suriyadi J: In brief, the prosecution's case is that on receipt of information, PW5 and a police party went to the Air Keroh Toll Plaza at about 3.30 am. There they stopped a white Proton Wira bearing registration No JDQ F 7643 driven by the accused who was alone. He was requested to drive the car to the side and after alighting, produced a packet of cigarettes carrying the trade name of Dunhill, from which were retrieved 12 rolls of cigarettes and a roll of nipah leaves which contained suspected ganja. The accused therefore was asked to open the boot and in the spare tyre compartment G was a plastic bag, later confirmed to contain cannabis, as defined under the Dangerous Drugs Act 1952 ('the Act'). At this stage, the accused was supposed to have said, 'itu ganja' and 'bagilah saya peluang'. The admissibility of these remarks were objected to by the accused on the basis that no caution was read out even though he was already under arrest. The prosecution subsequently charged him for trafficking in 2.7kg of cannabis. H

The prosecution called six witnesses of whom five were formal ones with the exception of PW5 who was the raiding officer. The witnesses comprised: PW4 who is the brother of the accused and who loaned that car to him; a police photographer who photographed the car and drugs; PW1, an officer from the Chemist Department who confirmed the seized I items as dangerous drugs defined under the Act; PW8, the investigating officer who kept the drugs; and PW7, a storekeeper who kept and maintained the records, as well as watching the movement of the drugs. The last was PW5, about the only relevant witness who suffered some intensive cross-examination by the accused's counsel.

Certain legal points cropped up during the hearing namely, whether: A

(1) by equating cannabis with Indian Hemp, no offence was committed;

(2) the statement made by the accused 'itu ganja' after the plastic bag was discovered at the boot of car was admissible;

(3) his follow-up remark, requesting a second chance on its own, was admissible; B

(4) he was already under arrest even though not physically touched or even told so;

(5) the case of the accused was prejudiced when the pack of Dunhill with the 12 rolls of cigarettes were tendered as exhibits; and C

(6) what the standard of proof at the end of the prosecution's case was, ie whether on a prima facie or a beyond reasonable doubt basis.

Whether equating cannabis with Indian Hemp has made the charge defective

The charge read: D

> Bahawa kamu pada 10 Januari 1997 lebih kurang jam 3.30 pagi di Plaza Tol Ayer Keroh Durian Tunggal, di dalam Daerah Alor Gajah, di dalam negeri Melaka, telah mengedar dadah berbahaya iaitu 2,624gm cannabis dan dengan itu kamu telah melakukan satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s 38B(2) Akta yang sama. E

Perusing the charge, it is crystal clear that the accused is being charged for trafficking in 2,624gm of cannabis which according to the prosecution is a dangerous drug under the Act. As to the definition of dangerous drugs, s 2 of the Act defines it as 'any drug or substance which is for the time being comprised in the First Schedule', with cannabis defined as 'any part of any F plant of the genus cannabis from which there is found to be present resin irrespective of its quantity, and by whatever name the plant may be designated'. Reading through the First Schedule, one is immediately made aware that there are five parts. Parts I and II both have the drug of cannabis in them. Historically, Pt III also had cannabis in it though G particularized as 'cannabis (Indian Hemp) and cannabis resin (resin of Indian Hemp)'. With effect from 12 April 1996, Pt III of the First Schedule was amended by the Dangerous Drugs (Amendment of First Schedule) Order 1996 by the Minister of Health, acting under s 45A(c) of the Act whereby the above 'cannabis (Indian Hemp) and cannabis resin (resin of Indian Hemp)' were deleted. This deletion, unfortunately for the H prosecution, resulted in many acquittals, among them being *PP v Md Alim bin Samad* [1998] 1 MLJ 260, *PP v Sulaiman bin Mohamad Noor* [1996] 1 MLJ 196 and *PP v Amir bin Mahmood & Ors* [1996] 5 MLJ 159. The reasons for the acquittals, from a reading of the cases in brief, showed that the prosecution witnesses had agreed with the defence during cross- I examination that Indian Hemp was cannabis, whilst at the same time confirming that the exhibits in those cases were Indian Hemp thus prompting to hold that by virtue of cannabis/Indian Hemp having been deleted from the First Schedule, no offence therefore had been committed.

A In the present case, the accused had attempted to exploit the same technique of wanting PW1 to describe the cannabis recovered from the accused as Indian Hemp. The witness instead said, 'I will not describe them within brackets as Indian Hemp. Indian Hemp is one of the common names for cannabis in other countries. It means one and the same thing'. He further added that Indian Hemp was not defined in any part of the Act and B described the exhibits as dangerous drugs under s 2 of the Act. Pressed further by the accused's counsel, he did equate cannabis to Indian Hemp but qualified it as meaning cannabis or Indian Hemp as under the old schedule. Finally, even though he viewed them to be Indian Hemp, yet they were cannabis as defined in s 2 of the Act.

C Putting his answers together and analysing them, I read it to mean that:

(1) Indian Hemp is one of the common names of cannabis in other countries;

(2) when he admitted that cannabis and Indian Hemp were one and the same thing, it was in reference to the old schedule;

D

(3) he admitted that they were Indian Hemp. Even though he admitted them to be so, it must be read in relation to his earlier answer which said that Indian Hemp is one of the common names for cannabis in other countries; and

E (4) that those drugs marked as P10(a), P12(a), P14(a) and P19(a) were cannabis as defined in s 2 of the Act.

I was hard pressed to detect any question or answers which confirmed that these cannabis, viz P10(a), P12(a), P14(a) and P19(a) were cannabis/ Indian Hemp as envisaged by the previous 'cannabis (Indian Hemp) and cannabis resin (resin of Indian Hemp)' in Pt III of the First Schedule. On F that score, I was unable to accept the submission of learned counsel for the accused that the above exhibits and their effect came within the four walls of the three Johor Bahru cases. As regards PW1, I must credit the chemist expert before me for not only being truthful but also careful. No one in his right frame of mind could chastise him for agreeing to the accused's G suggestion that Indian Hemp, by virtue of its name as used by foreigners, was one and the same thing with cannabis. To say otherwise would have been an outright lie. His answers merely strengthened his credibility. As regards his answers, as I was satisfied that P10(a), P12(a) P14(a) and P19(a) 'by whatever name the plant may be designated' as provided by the interpretation section was cannabis as defined under s 2 of the Act, the H charge therefore was in order.

Remarks by the accused

As to whether the remarks 'itu ganja' and 'bagilah saya peluang' were admissible in evidence or otherwise depends on several legal niceties, inter I alia, whether when the remarks were made the accused was under arrest or not and whether the statements were admissible confessions.

It is the law of evidence that a confession made by an accused person is irrelevant in a criminal proceeding if the making of the confession

appears to the court to have been caused by any inducement, threat or promise having regard to the charge against him, proceeding from a person in authority.

This strict inhibition as regards the usage of a confession is further watered down by s 26 of the Evidence Act 1950 which reads:

> (1) Subject to any express provision contained in any written law, no confession made by any person whilst he is in the custody of a police officer, unless it is made in the immediate presence of a president of a sessions court or magistrate shall be proved as against that person.

To restate the above statutory provision, a confession is admissible if:

(1) Express provisions allow it (subject to any express provision contained in any written law ...); and

(2) the confession is made before a president of a sessions court or magistrate.

On the basis that this statutory permission allows a confession to be used against the maker by virtue of the above opening words 'subject to any express provision contained in any written law ... ', a statement, be it a confession or not, therefore becomes admissible under s 37A(1) of the Act as this Act is written law (*PP v Ng Goh Weng & Anor* [1979] 1 MLJ 127 at p 128). Section 37A(1) reads:

> Where any person is charged with any offence against this Act any statement, whether such statement amounts to a confession or not ..., shall notwithstanding anything to the contrary contained in any written law, be admissible at his trial in evidence and ... :
>
> Provided that no such statement shall be admissible or used as aforesaid —
>
> (a) ...
>
> (b) in the case of a statement made by such person after his arrest, unless the court is satisfied that a caution was administered ... .

At this juncture I will jump into the affray and say that the above portion is in pari materia with s 113(1)(a)(ii) of the Criminal Procedure Code (FMS Cap 6) ('the CPC'). It is well established in law that for a statement to be admissible, certain conditions must be complied with, among them the voluntariness of that statement (see *PP v Kang Ho Soh* [1991] 3 CLJ 2914 at p 2917; *PP v Aidil bin Ma'rof* [1992] 2 CLJ 1239). It is also established that before a ruling on the voluntariness of a statement is made, the prosecution must beforehand have read out the caution to the accused (*PP v Chan Choon Keong & Ors* [1989] 2 MLJ 427; Augustine Paul, *Trial within a trial* (1994) Old Bailey Press).

In brief, that is the scenario and treatment to be meted out to statements desired to be used by the prosecution, as against an accused person, after his arrest. What then is the status of a statement or confession made by an accused person if no arrest had taken place? It is now trite law that if a statement is made by a person before any arrest is effected on him,

and no caution has been read out to him, so long as that statement was not caused by any inducement, threat or promise having reference to the charge against him, such statement may be relevant and admissible as against him. The omission of the caution in appropriate cases may merely go toward the voluntariness of the statement (see *Boudreau v R* [1949] SCR 262; *R v Voisin* [1918] 1 KB 531 at pp 537–538; Augustine Paul, *Trial within a trial* (1994) Old Bailey Press). In the present case, the prosecution attempted to introduce the statements of the accused made prior to the discovery of the drugs in the spare tyre compartment, but was objected to, on the basis that when the remarks were made, the accused was already under arrest and no caution was read out to him thereafter. Not unexpectedly, the learned deputy public prosecutor ('the DPP') vehemently denied such arrest. That being so, there was a necessity on my part to scrutinize the facts and conclude whether he was in fact arrested before deciding on whether to admit the statements or otherwise.

At the risk of repeating the facts, but necessary to resolve this matter, the accused after alighting from the car had produced a Dunhill packet (P16), which contained 12 rolls of cigarettes and a roll of nipah leaf (P17A–L and P20). PW5 suspected immediately that the cigarettes contained cannabis when he realized that the cigarettes had been tampered with. He knew by then that an offence had been committed by the accused. With that perception in mind, he then went to the rear of the car, had the boot opened and then saw a plastic bag. He thereafter asked the accused what it was, and it was at this juncture that the hotly contested answer was given. PW5 admitted on cross-examination that even before this statement was uttered by the accused, any attempt by him to flee would have resulted in his detention. In fact, PW5 had considered the accused to be under arrest. Things became slightly muddled when during the re-examination stage, PW5 clarified that his perception of the accused being under arrest took form only after he obtained the answer as to the contents of the plastic bag from the accused. It then became encumbent upon me to sift the evidence and to decide whether in actuality PW5 was deliberately tailoring his answers toward a successful prosecution or was confused at the cross-examination stage. On a finding of fact, I was satisfied that PW5 had suspected that the accused had committed an offence when he was found in possession of the 12 rolls of cigarettes suspected of containing ganja. At that point of time, even before the plastic bag was discovered, in his view the accused was already under arrest. I was also convinced that the police would have used all the necessary force to restrain him if he had attempted to flee. Similarly, I was satisfied that it would have been suicidal for the accused to attempt to escape when he was surrounded by a party of armed policemen. The only snag to the whole scenario was the fact that the accused was never detained physically, eg by handcuffing him or told in so many words that he was under arrest. Not surprisingly, learned counsel for the accused exploited the perception of the police officer whilst the learned DPP derided that perception by regurgitating cases which required some physical restraint before a person was construed to be under arrest.

The relevant provision with regard to arrest is s 15 of the CPC and it reads:

> (i) In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested unless there be a submission to the custody by word or action.

A simple reading of the above provision will impress any reader that some restraining of the liberty of the person by certain acts, physical or otherwise, is required, which will immobilize him although actual arrest will become unnecessary if there is submission to the arrestor. In *Shaaban & Ors v Chong Fook Kam & Anor* [1969] 2 MLJ 219 at p 220, Lord Devlin said:

> An arrest occurs when a police officer states in terms that he is arresting or when he uses force to restrain the individual concerned. It occurs also when by words or conduct he makes it clear that he will, if necessary, use force to prevent the individual from going where he may want to go. It does not occur when he stops an individual to make enquiries.

By virtue of attempts by jurists to interpret the meaning of arrest, two schools of thought have germinated, one requiring actual arrest whilst the other sufficiently satisfied if a person is already in a state of being watched or guarded to prevent his escape. As for the latter view, the issue of whether in a particular case a person was under arrest at a given moment of time, is a question of fact to be decided according to the facts of each case. To mention a few cases, this view is clearly reflected in *Sambu v R* [1947] MLJ 16, *PP v Salamah binte Abdullah & PP v Ong Eng Kiat* [1947] MLJ 178 and *Tan Shu En & Anor v PP* [1948] MLJ 196. In the classic case of *Jayaraman & Ors v PP* [1982] 2 MLJ 306, the court was of the view that mere inquiries or even a request 'not to leave the compound of the temple' did not tantamount to having the accused under arrest. In other words something extra was required for a person to be considered as under arrest. With the advent of *PP v Salleh bin Saad* [1983] 2 MLJ 164 the mood swung to actual arrest and not constructive arrest. This case was strongly supported by *PP v Lim Kin Ann* [1988] 1 MLJ 401 and *PP v Tan Chye Joo & Anor* [1989] 2 MLJ 253.

The case of *Krishnan v PP* [1987] 1 MLJ 292 saw an interesting development in the law when their Lordships in the Supreme Court enunciated that the accused was already under arrest when he was being pursued to his house by the police. Wan Adnan J (as he then was) in *Tan Chye Joo*, even though after *Krishnan*, distinguished the facts of *Krishnan* with that of the case before him by alluding to the remarks of the police witness and the lack of evidence to show that there was an attempt by the arrestee to escape.

Peh Swee Chin J (as he then was) in *PP v Rosyatimah bte Neza & Anor* [1989] 1 MLJ 360 created a ripple again when his Lordship endorsed the constructive arrest concept and at the same time adding that a person was under arrest if 'from the circumstances it can be implied that his personal liberty has been restrained'. Three years later, the issue of arrest made its appearance again in *PP v Kang Ho Soh* [1991] 3 CLJ 2914 when his Lordship Mahadev Shankar J (as he then was) said at p 2917:

A But whether in a particular case a person was under actual arrest at a given moment of time is a question of fact, to be decided according to the circumstances of each case.

Having considered the relevant views of those eminent judges, I found myself to be in complete agreement with the view of Mahadev Shankar J B not only due to its sensibleness and pragmatism but also because it is in full consonent with the statutory provision.

If a person could be construed as being under arrest *even though still being pursued*, then a person whose movements have been immobilized so to speak, either by the physical presence of the police or incapacitated by C fear of injury to his person, surely must mean that he, beyond all doubt, has been arrested. Actual arrest is the perfect situation where the requirements of s 15 of the CPC are adhered to, after the needful has been completed during the investigation. As in this case, if the police had physically arrested him, entailing handcuffing him, such an act would have hampered the investigation as the accused was still required to personally D open the boot of car and to retrieve any incriminating merchandise if necessary. Since he had been found in possession of 12 rolls of cigarettes suspected to contain cannabis, with the police not wanting to hamper his movements as his assistance was still required, compounded further by the view of PW5 that he had considered the accused to be under arrest, how could I decide that the accused was not under arrest? That being so, with E no caution forthcoming, his statements therefore were inadmissible, be it 'itu ganja' or 'bagilah saya peluang', as they were from one transaction and uttered consecutively.

On the assumption that PW5 had not noticed the drugs in the packet of Dunhill, would the facts permit me to conclude that he was under F arrest? Scrutinizing the facts, it was obvious that he did ask the accused to drive the car to the side of the main road and at that instance the latter could have just sped off leaving the police party helpless and feeling foolish. But as it were, he proceeded to obey the instructions of PW5 and thereafter alighting. One must bear in mind that PW5 and the police party G went to the Air Keroh Toll Plaza pursuant to some information oblivious of the outcome. No evidence was adduced by the prosecution let alone being suggested by the accused that (the attempt to adduce prejudicial evidence by method of 'putting it to you' was withdrawn):

(1) the accused was the target;

H (2) there were drugs in the targeted car;

(3) the car targetted will bear registration No JDQ 7643; and

(4) the drugs will be at the boot with the knowledge of the accused (*Alcontara a/l Ambross Anthony v PP* [1996] 1 MLJ 209 at pp 220H–I to 221A–G).

I I could not permit myself to go beyond the borders of the facts adduced by PW5 but to accept at face value the neutral evidence of the police having gone there on information received. I had to proceed on the basis that he went there without a prejudiced mind and as providence wants it, was

successful in recovering a large amount of drugs and thereafter arrested the accused. On that understanding, the discovery of the drugs in the plastic bag would be pursuant to a routine check. Proceeding on those facts, the only reasonable conclusion that I could arrive at was that if the cigarettes were not found on him, I would not have considered him to be under arrest and therefore any incriminating remarks made by the accused would have been admissible. The discovery of the 12 rolls of cigarettes suspected of containing cannabis made all the difference. The recovery of the drugs in the plastic bag had also upgraded the accused, by a quantum leap, from a mere user to that of a potential trafficker in the eyes of the prosecution.

This circuitous or comparative method merely confirmed the direct evidence produced by the prosecution that the discovery of the drugs on the accused resulted in the statements becoming inadmissible.

Tendering the packet of cigarettes

Learned counsel for the accused had indicated his objections pertaining the tendering of the packet of Dunhill with tampered cigarettes, on the basis that they were not part of the charge and therefore prejudicial to the accused. Interestingly enough, this argument bites both ways in that if the cigarettes were non-existent or disallowed to be tendered, the accused would lose his protection as without that intervening factor, his incriminating statements could have been admissible. In a nutshell, the strength of the prosecution's evidence was tremendously reduced by the introduction of these cigarettes. Now the accused ironically has objected to them being tendered. Despite my sympathy with the intention of the counsel, the court's concern is merely to act as a referee and ensure that the tenets of law are complied with fully, regardless of the course of action of the accused (see *Packiam & Anor v PP* [1972] 1 MLJ 247).

As far as the prosecution was concerned, I could well imagine that there was a real fear on their part of the invocation of s 114(g) of the Evidence Act 1950 if the drugs were not included as part of the prosecution's exhibits, hence that course of action. Even though the prosecution had not combined those drugs with that found in the plastic bags, nothing negative should be read into that as that was their choice. Weight wise, the amount of drugs from the cigarettes if added to the main drugs would not have made much difference to the presumption section as it was already above the statutory amount.

I had no problem in separating the drugs in the plastic bags with that of the contents of the cigarette packet as a totally different set of considerations was applied by me. Admittedly, drugs were found on the body of the accused but the shape, content, type and structure of the two sets of drugs were totally different. The drugs found on his body were finished products which merely required lighting and inhaling whilst that at the boot entailed further tearing, wrapping, decompressing, turning them into fine products similar to that found in the cigarette rolls, marketing and eventually to be consumed by the consumer. In other words, the drugs

found at the boot had a long journey to go before eventually reaching the stage of the cigarettes. These factors taken into account show the vast intrinsic difference between the two sets of drugs and the dimension to be considered let alone the source. I must at the outset clear any doubt that, merely by having a small amount of drugs on his body, it thus could be implied that he must have known of the drugs in the boot of the car. I must also make it clear in no uncertain terms that the discovery of the drugs on his body did not in any way prejudice my mind en route to deciding whether the accused had knowledge of the drugs in the car boot or otherwise. In an indirect fashion, the accused is deprived of the ground that the prejudicial effect of that evidence, ie the ganja found on his body, outweighed its probative value.

At the end of the day, what counts is that the considerations applicable for the two sets of drugs were totally at variance. It was canvassed by En Anselm, the learned DPP, a stance with which I am in total agreement, that other evidence may be admitted although prejudicial to the accused. In the case of *Wong Yew Ming v PP* [1991] 1 MLJ 31, the following question of law of public interest was posed before the Supreme Court (at p 31):

> Whether in a trial in which an accused is charged for trafficking in respect of a particular quantity of dangerous drug, to wit, heroin, at a particular place and time, evidence may be admitted that on previous occasions he had sold dangerous drugs, although such evidence is prejudicial to the accused.

Their Lordships answered the question in the affirmative as that additional evidence was relevant to show knowledge and that the possession of the drugs was not accidental. Apart from this case, the learned DPP also adverted to the case of *Thavanathan Balasubramaniam v PP* [1997] 2 MLJ 401 for my consideration. The question brought for determination before the Federal Court was whether it was open to the appellate judge to analyse, comment and take into account the evidence adduced on a charge of which an accused person had been acquitted to support his conviction on a second remaining charge. Their Lordships in the Federal Court, in answer to the legal poser, viewed it positively on the basis of relevancy. Chong Siew Fai CJ (Sabah and Sarawak) opined (at p 411):

> Therefore, on the question of general nature as raised and in the context of the case presently under reference without pinpointing to any particular piece of evidence, it is our view that the answer is in the affirmative provided the evidence on the charge of soliciting is properly admissible on the trial of the charge of accepting, and it is so admissible if it satisfies the law of evidence relating to relevancy which, in our present context, are principally ss 5, 6, 7, 8 and 9 of the Evidence Act 1950 (ie briefly, if the evidence constitutes facts in issue, or if the evidence constitutues collateral facts which: (i) form part of the same transaction, or (ii) are the immediate occasion, cause, or effect of fact in issue, or (iii) show motive, preparation, or conduct affected by a fact in issue, or (iv) are necessary to be known in order to introduce or explain some relevant fact) unless the exclusionary rules, eg rules relating to hearsay, apply.

Clearly, the factor of relevancy has taken the front seat but then their Lordships did say that it was ' ... in the context of the case presently under reference'. Aided by all those relevant considerations, without being arbitrary or capricious, I applied my discretion and permitted those cigarettes to be tendered (see *Tan Geok Kwang v PP* [1949] MLJ 203 and *Noor Mohamed v R* [1949] 1 All ER 365).

Prima facie or beyond reasonable doubt

Under the law as provided by the amended CPC, all that the prosecution needs to prove is a prima facie case which is worlds apart to that of a beyond reasonable doubt test.

The accused had canvassed that the burden of proof is that of beyond reasonable doubt and not prima facie as he was arrested before Act A979 was promulgated. This Amendment Act came into effect as of 31 January 1997. By virtue of s 4 of this Amendment Act, s 180 of the CPC was comprehensively amended resulting in the view of the Federal Court in the case of *Arulpragasan a/l Sandaraju v PP* [1997] 1 MLJ 1 becoming inoperable. In *Arulpragasan*, his Lordship Eusoff Chin Chief Justice opined (at p 12):

> It is trite law that the onus is on the prosecution throughout the case in any criminal trial to prove the charge against the accused beyond reasonable doubt. In my view, the same standard of proof applies at the intermediate stage of the trial, ie at the close of the prosecution.

The amended s 180 in unambiguous terms provides that for criminal cases in the High Court, after the prosecution case is concluded, the court shall consider whether the prosecution has made out a prima facie case (see *Rozi bin Ramli v PP* Melaka Criminal Appeal No 42–3–1997). The issue of burden of proof was put to the test when Mr Teh Poh Teik ventilated that the level of proof should be based on a beyond reasonable doubt basis rather than that of prima facie. The only reason for this assertion by him was due to the fact that the accused was arrested on 10 January 1997 whilst the effective dated of the amended section was 31 January 1997. On further perusal of the charge sheet and the available documentation, I found that the accused made his first appearance in court on 24 January 1997, ie seven days before Act A979 came into effect. In the case of *Bahruni bin Ismail v PP* [1997] 2 MLJ 265, the Federal Court at p 270 said:

> While we appreciate that s 180 of the CPC has now been amended to provide for a prima facie standard of proof at the close of the case for the prosecution, it cannot be gainsaid that that amendment has no retrospective effect. There is nothing in the amendment itself to even suggest this. Therefore, *it is never in doubt that Parliament in its wisdom has not made it retrospective*. Both the learned DPP and learned counsel for the appellant conceded this. Therefore, the amendment having been gazetted on 30 January 1997 would for all practical purposes come into effect only on 31 January 1997. Thus, the amendment would only be applicable to cases *filed after that date* and not to cases before that date and this would include decided cases pending appeal. In all cases before 31 January 1997, the beyond a reasonable doubt standard of proof must of necessity apply as all along there can be

A only one interpretation of s 180 of the CPC, and that is as decided by the majority decision in *Arulpragasan*. (Emphasis added.)

Two relevant points of law directly in point for the present case have emanated from the above paragraph namely that:

B (1) by this pronouncement, all cases filed before 31 January 1997 at the prosecution's stage must be assessed on a basis of a standard of proof of beyond reasonable doubt; and

(2) the relevant words 'filed after that date' govern the standard of proof. Thankfully, s 30(b) of the Interpretation Acts 1948 and 1967 which promulgates that under this provision the right of the accused, ie the C vested right to a standard of proof of beyond reasonable doubt, is unaffected by any repeal of a written law in whole or in part, was not put to the test. This is so as the case against the accused was filed seven days before the amendments came into effect.

On the above interpretation, the present case must be judged at the D prosecution's stage on the beyond reasonable doubt standard as decided by *Arulpragasan*.

To regurgitate the evidence:

(1) The accused's presence at 3.30am at the Air Keroh Toll Plaza. His presence at such an unholy hour of the morning at the Air Keroh E Toll Plaza when any sensible person would be safely tucked under his blanket should not be taken against him. At best it is unusual, but to liken being out very early in the morning to criminality would rope in anyone working on night shifts, persons returning from karaokes or even anyone returning home from religious classes.

F (2) The hiring of the vehicle. It is a fact that the car was constantly being hired out, and by cross-referring to the date printed on the newspaper which was 8 March 1997, it must have been last hired out two days before the arrest. The fact that the vehicle was rented out often must be taken for a fact as it was confirmed by a prosecution witness, ie the G brother of the accused. There was absolutely no evidence that the newspaper was bought by the accused and since it could also have been bought by the hirer, the most favourable inference must be given to the accused. That being so, that car must have been last rented out to the last hirer who bought that Chinese newspaper, ie on H 8 March 1997. He must have thereafter used that newspaper as a wrapper and eventually left the dangerous items in the boot of the car. Why he did not take it back is not for the accused to explain. There could be 1,001 reasons for it.

(3) The short span of time from the day the vehicle was returned until I the day he was arrested. Due to the short period of two days, it is probable that the accused did not have time to clear the car of any belongings left by the previous hirer. Moreover, it would be a bit unusual for anybody to even browse let alone lift the spare tyre compartment cover unless the vehicle had suffered a punctured tyre earlier.

(4) Lack of evidence of knowledge on the part of the accused regarding the presence of the plastic bag in the vehicle. The cross-examination of the accused suggesting that he was aware of the plastic bag and was returning to the owner that plastic bag should not be used to complement or strengthen the glaring weaknesses of the prosecution's case. The prosecution must also be aware that the suggestions advanced by the counsel are mere unsubstantiated allegations that do not qualify as evidence as they were not adduced by the accused. They were mere suggestions from the Bar table. The advancing of such a defence at the prosecution's stage through cross-examination also was to avoid any assertion that that defence was an afterthought.

(5) Lack of knowledge of the contents. Absolutely no direct evidence was adduced by the prosecution to show that the accused was aware of the contents. In fact, even if he had known of existence of the plastic bag, that does not imply that he knew the contents. The prosecution must prove the latter factor beyond reasonable doubt.

(6) Conduct of the accused. Touching on the conduct of the accused on that fateful night, PW5 said that prior to the recovery of the plastic bag, the behaviour of the accused was 'gentlemanly'. It must have meant that the accused was oblivious to any incriminating matter in the car and hence that profile. Even if he had shown apprehension, that outward appearance could also be construed as surprise followed by uncertainty, spiced with a tinge of fear that due to what was left behind by the hirer he was in for a nasty time with the local constabulary.

(7) The sole occupancy of the car by the accused. Similar to the case of *PP v Lin Lian Chen* [1992] 2 MLJ 561, the introduction of evidence showing that the accused was the sole occupant of the car (a car also owned by another person) was of no assistance to the prosecution either. In the above case, the accused who was the sole occupant of the car was also arrested for being in possession of drugs. The Law Lords saw nothing wrong with being alone in a car. As in *Lin Lian Chen*, the drugs were not recovered from a specially constructed compartment and therefore the presumption under s 37(h) of the Act did not apply. The car also was not 'anything whatsoever containing any dangerous drug' and therefore attracted no presumption as per s 37(h) of the Act (see also *Tong Peng Hong v PP* [1955] MLJ 232).

(8) No fingerprints were taken nor were fingernails clipped to trace the presence of drugs. This is a factual shortcoming which was also discussed in the above precedent. No evidence was adduced to show that plastic bag or anything in it had been dusted for fingerprints. Similarly, no evidence of the accused's hands or fingernail clippings were examined for traces of cannabis.

In this case, no presumption provisions have come to the rescue of the prosecution, and therefore the latter is only left with direct evidence. Unfortunately, even that direct evidence is not available to the prosecution

A and, consequently, has relied on circumstantial evidence which at best, in this case, is minimum. If I may quote Edgar Joseph Jr SCJ in *PP v Lin Lian Chen* where his Lordship said (at p 567):

> It is trite law that where the prosecution is relying on circumstantial evidence, the onus upon it is a very heavy one and that evidence must point irresistibly
B to the guilt of the accused. If there are gaps in it, then that will not be sufficient (per Pike CJ in *Chang Kim Siong v PP* [1968] 1 MLJ 36).

With the standard of proof required of the prosecution being that of beyond reasonable doubt, I am not convinced that that level has been attained. In fact, I am not even convinced that a prima facie case has been
C proven as the inclination of the evidence adduced amounted to nothing more than mere suspicion. That certainly is inadequate for me to call the defence and I therefore acquit and discharge the accused.

Accused acquitted and discharged.

D Reported by David Lai

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